

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

Broadband Industry Practices

)
)
)

WC Docket No. 07-52

COMMENTS

The undersigned competitive carriers submit these comments in response to the *Broadband Industry Practices NOI*.¹ There, as well as in other recently initiated proceedings,² the Commission asks a number of questions the answers to which could underlie important regulatory decisions that the Commission may be called upon to make concerning the provision and availability of broadband services in the United States. In particular, in the *Broadband Industry Practices NOI*, the Commission will examine whether there is a need for greater regulatory oversight concerning "net neutrality." The Commission asks "whether network platform providers and others favor or disfavor particular content, how consumers are affected by these policies, and whether consumer choice of broadband providers is sufficient to ensure that all such policies ultimately benefit consumers."³

While the undersigned competitive carriers reserve the right to make substantive policy recommendations at a later time concerning the net neutrality issues raised in the *Broadband*

¹ *Broadband Industry Practices*, Notice of Inquiry, FCC 07-31, WC 07-52, released April 16, 2007 ("*Broadband Industry Practices NOI*").

² Inquiry Concerning the Deployment of Advanced Telecommunications *Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, GN Docket No. 07-45, FCC 07-201, released April 16, 2007 ("*Advanced Services NOI*"), ¶ 11.

³ *Broadband Industry Practices NOI* ¶ 1.

Industry Practices NOI, the undersigned carriers are herewith filing in the record of this proceeding their Petition filed earlier this year concerning ILEC copper loop retirement practices.⁴ As pointed out in the Petition, recent technical and marketplace developments make clear that the long-sought “third-wire” to the home already exists; that preservation of copper loops serves the public interest because CLECs are able to use them to provide a “triple play” of video, voice, and high-speed Internet access that affords consumers new service choices and lower prices; but that current rules permit ILECs to waste valuable copper loops for any or no reason or merely in order to preclude potential broadband competitors from providing service.

The Petition stressed that current rules that permit ILECs to retire copper loops with little or no regulatory oversight disserve the public interest because they fail to implement the mandate of Section 706 of the 1996 Act.⁵ The availability of unbundled access to spare copper loops to competitive carriers for the provision of broadband services helps assure that, as mandated by section 706, advanced telecommunications capability will be provided to all Americans on a reasonable and timely basis. The undersigned carriers have pointed out that most ILECs are not installing overbuild fiber, and Verizon has plans to do so for only 50% of its subscribers.⁶ Copper loops used by CLECs provide another choice for a majority of customers to receive broadband service. In fact for many customers, copper-based broadband services will be more affordable and desirable than fiber service. In addition, the improved technical capability of

⁴ Petition of BridgeCom International, Inc. *et al.* filed January 18, 2007 (“Petition”); Pleading Cycle Established for Comments on Petitions for Rulemaking and Clarification Regarding the Commission’s Rules Applicable to Retirement of Copper Loops and Copper SubLoops, Public Notice, RM-11358, DA 07-209, released January 30, 2007.

⁵ Section 706 requires the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... including [by] measures that promote competition in the local telecommunications market” 47 U.S.C. § 157(b).

⁶ Reply Comments of BridgeCom International, Inc. *et al.*, RM-11358, filed April 2, 2007, p. 11.

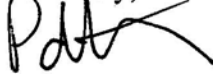
copper provides an affordable, immediately available means for rural areas to participate in broadband services without the expense and delay of installing fiber.

The continued availability of unbundled access to copper loops as sought in the Petition will help assure that consumers have a choice of broadband service provider. That choice, in turn, would provide consumers with lower prices, greater choice of service options, innovation, and diversity of programming choices. Therefore, the resolution by the Commission of its question in this proceeding "whether consumer choice of broadband providers is sufficient to ensure" that platform providers' practices "ultimately benefit consumers"⁷ should be that the continued availability of unbundled access to copper loops that ILECs would otherwise retire will facilitate consumer choice and benefit consumers.

⁷ *Broadband Industry Practices NOI* ¶ 1.

Accordingly, the Commission should promptly grant the Petition for all the reasons stated therein as well as to facilitate decision-making in this proceeding.

Sincerely,



Andrew D. Lipman
Russell M. Blau
Tamar E. Finn
Patrick J. Donovan

BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000

Attorneys for

BridgeCom International, Inc.
Broadview Networks, Inc.
Cavalier Telephone, LLC
DeltaCom, Inc.
Eureka Telecom, Inc. d/b/a InfoHighway
Communications
Florida Digital Network, Inc. d/b/a FDN
Communications
IDT Corporation
Integra Telecom, Inc.
McLeodUSA Telecommunications Services, Inc.
Mpower Communications Corp.
Norlight Telecommunications, Inc.
Pacific Lightnet, Inc.
RCN Telecom Services, Inc.
RNK, Inc.
Talk America Holdings, Inc.
TDS Metrocom, LLC
U.S. Telepacific Corp. d/b/a Telepacific
Telecommunications

June 15, 2007

Attachment

**Petition for Rulemaking and Clarification
(January 18, 2007)**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FILED/ACCEPTED

JAN 18 2007

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Policies and Rules) RM - _____
Governing Retirement of Copper Loops)
By Incumbent Local Exchange Carriers)

PETITION FOR RULEMAKING
AND CLARIFICATION

BridgeCom International, Inc.
Broadview Networks, Inc.
Cavalier Telephone, LLC
Eureka Telecom, Inc. d/b/a InfoHighway
Communications
Florida Digital Network, Inc. d/b/a FDN
Communications
IDT Corporation
Integra Telecom, Inc.
DeltaCom, Inc.
McLeodUSA Telecommunications Services, Inc.
Mpower Communications Corp.
Norlight Telecommunications, Inc.
Pacific Lightnet, Inc.
RCN Telecom Services, Inc.
RNK, Inc.
Talk America Holdings, Inc.
TDS Metrocom, LLC; and
U.S. Telepacific Corp. d/b/a Telepacific
Telecommunications

Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000

Their Attorneys

January 18, 2007

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	iii
I. PRESERVATION OF COPPER LOOPS BENEFITS CONSUMERS	2
II. CURRENT COMMISSION POLICIES DO NOT SUFFICIENTLY PROTECT THE PUBLIC INTEREST IN ACCESS TO NEW SERVICES PROVIDED OVER COPPER LOOPS	4
A. ILECs Have Strong Anticompetitive Incentives to Retire Copper	4
B. Current Rules Do Not Adequately Protect the Public Interest	7
III. PROPOSED RULE CHANGES AND CLARIFICATIONS	10
A. The Commission Should Clarify "Retirement"	10
B. The Standard for Permissible Loop Retirements Should be Clarified And Strengthened	11
C. An Opportunity for Comment Should Apply to Retirement of the Feeder Portion of Loops	12
D. Objections Should Not Be Deemed Denied	12
E. The Commission Should Clarify that States May Adopt Restrictions that Are Stronger Than FCC Rules	13
F. The Commission Should Consider Sale or Auction of Spare Copper Loops	14
G. Forbearance Standards Should Be Clarified to Establish that UNE For- bearance Does Not Encompass Unused Pre-Retirement Copper Loops	14
IV. CONCLUSION	17

SUMMARY

Recent technical and marketplace developments make clear that the long-sought “third-wire” to the home already exists. It is the copper loop that remains in place after the ILEC installs overbuild fiber. Preservation of these loops serves the public interest because CLECs are able to use copper loops to provide a “triple play” of video, voice, and high-speed Internet access that affords consumers new service choices and lower prices. And, consumers have already paid for these copper loops.

Current rules, however, permit ILECs to waste valuable copper loops for any reason or merely in order to preclude potential broadband competitors from providing service. The Commission should revise its rules to assure that the public interest in provision of competitive services over legacy copper loops is protected from ILEC incentives to harm competition.

The Commission should clarify that “retirement” refers to the actual physical removal of copper and that in all other circumstances copper loops remain subject to unbundling. Revised rules should permit ILECs to retire copper only if necessitated by natural events, accidents, or to avoid undue hardship to the ILEC. The Commission should revise its network disclosure rules to permit objections to retirement of the feeder portion of the loop and to provide that objections will be denied by order, rather than automatically denied within 60 days if the Commission fails to take action. The Commission should clarify that states may adopt rules governing copper loop retirement that are stronger than the Commission’s requirements. The Commission should consider requiring that ILECs sell loops that they might otherwise choose to retire. Finally, the Commission should clarify forbearance standards to provide that any forbearance from Section 251(c)(2) obligations does not apply to spare copper loops that have been overbuilt by fiber.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Policies and Rules)	RM- _____
Governing Retirement of Copper Loops)	
By Incumbent Local Exchange Carriers)	

**PETITION FOR RULEMAKING
AND CLARIFICATION**

In this Petition for Rulemaking and Clarification, the undersigned competitive local exchange carriers, through counsel, petition the Commission to establish strengthened safeguards to protect against ILEC anticompetitive copper loop retirement.

As AT&T and Verizon continue to overbuild their existing networks with fiber, it is becoming increasingly clear that the long-sought "third wire" to the home already exists – it is the copper loop that remains in place and available for competitive use after the incumbent installs new fiber. Ongoing technological advances have made it possible to offer broadband services over this existing facility, and for consumers to reap the benefits of increased competition in the delivery of voice, video, and information services. Existing Commission policies, however, must be strengthened and clarified to protect the public interest in the availability of broadband services over legacy copper loops. The legacy copper network is a valuable asset, which has been installed and maintained at ratepayer expense. Incumbent LECs must not be permitted to deprive consumers of the benefits that this legacy copper network will continue to provide, simply, as a means to raise competitive barriers in the information delivery market.

The Commission's current policy allowing copper loop retirement was apparently premised on the belief that "[t]he phone companies are sitting on aging infrastructure," and that

“[c]opper wire will end its life.”¹ These views have proved shortsighted and, in fact, are all too familiar.

In the 1980s, many RBOCs pronounced that their copper facilities were short-lived assets, and urged state rate regulators to set depreciation rates for copper plant using no more than a 10 to 15 year depreciable life. Years later more innovative competitive providers rolled out DSL over those same copper facilities. Now it has been shown that copper is also capable of supporting a “triple play” of video, Internet access, and voice. Copper loops cannot be considered outmoded as long as service providers are able to find efficient and productive ways to use them, and the Commission should not favor a public policy that hinders the ability of enterprising service providers to continue devising new uses for copper plant. There is no reason to artificially restrict supply when the facility remains in demand.

The Commission should revise its copper loop retirement rules to assure that consumers may obtain the benefits of these new technical and marketplace developments not previously envisioned by the Commission.²

I. PRESERVATION OF COPPER LOOPS BENEFITS CONSUMERS

Technical improvements have enabled carriers to provide competitive broadband services over copper loops long after incumbents thought otherwise. Now, new technical standards permit copper to support services up to 100 Mbps, which permits provision to businesses and consumers of triple play services, HDTV, VoD, high-speed data, mid-band Ethernet, VoIP, high speed Internet access, videoconferencing, virtual private networks, PBX Extensions, and video

¹ “Copper Lines Regaining Luster,” quoting then FCC Chairman Michael K. Powell, Washington Post, February 7, 2003, <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A38106-2003Feb6¬Found=true> (December 27, 2006).

² Pursuant to Section 1.401(c) of the Commission’s Rules, 47. C.F.R. § 1.401(c), “this Petition sets forth the “substance,” but not the text, of the proposed rules”.

surveillance.³ Cavalier Telephone, LLC launched its IPTV cable service throughout Richmond, Virginia last summer and expects to expand its TV offering across its footprint⁴ in the coming year. Cavalier's IPTV service customers can receive 150 TV channels, broadband Internet access, and unlimited telephone service at 33% or more savings. And use of existing copper avoids the costs of installing FTTH while providing comparable services to consumers. Even some ILECs are providing the "triple play" over copper.⁵

The Commission has consistently sought to encourage development of facilities-based broadband competition generally⁶ and more recently competition in the provision of video programming⁷ in order to benefit consumers through lower prices, greater innovation, and additional service options. Use of copper loops permits the development of a third facilities-based wireline broadband and video programming provider. As the Commission's longstanding

³ "New VDSL2 Standard Will Bring Fiber-Fast Broadband," <http://www.convergedigest.com/bp-ttp/bp1.asp?ID=188&ctgy=>; *The Story of 10 Gigabit Over Copper*, Network World, <http://www.networkworld.com/newsletters/lans/2006/0821lan1.html> (December 27, 2006).

⁴ Cavalier Telephone serves the metropolitan areas of Richmond, VA.; Norfolk/Virginia Beach, VA.; Northern Virginia, Maryland, and the surrounding D.C. areas; Baltimore, MD.; Wilmington, DE.; Dover DE.; and Philadelphia, PA. In addition Cavalier has recently acquired Talk America, expanding its service areas to Michigan, Ohio, Georgia, and other state.

⁵ *SureWest Launches IP-Video Over Copper*, Telephony Online, http://telephonyonline.com/broadband/web/telecom_surewest_launches_ipvideo/ (January 10, 2007).

⁶ See e.g. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, FCC 02-42, released February 15, 2002, ¶ 4 ("We believe that by promoting the development and deployment of multiple platforms, competition in the provision of broadband capabilities can thrive, and thereby ensure that the needs and demands of the consuming public are met."); *Internet Over Cable Declaratory Ruling*, 17 FCC Rcd 4798 (2002), ¶ 73 ("we seek to encourage facilities-based broadband competition"); *Echostar Communications Corporation*, 17 FCC Rcd 20559 (2002).

⁷ FCC Adopts Rules to Ensure Reasonable Franchising Process for New Video Market Entrants, Public Notice, December 20, 2006 ("...the franchising process constitutes an unreasonable barrier to entry that impedes the achievement of the interrelated goals of enhanced cable competition and accelerated broadband deployment."); *Id.*, Separate Statement of Chairman Kevin J. Martin ("[w]hen consumers have the ability to choose among more than one cable operator, they receive one of the most important benefits of competition that the 1996 Act envisioned: lower prices.")

policy recognizes, this will strongly promote the benefits to consumers of lower prices, greater innovation and additional service offerings.

Further, these benefits can be obtained at a modest cost. Consumers have already paid for the legacy copper plant.⁸ The legacy network is immensely valuable; it represents billions of dollars of investment and, potentially, enormous revenues from the advanced services that now can be provided over it. It is far more economically efficient to use existing copper than to duplicate it. In fact, retirement of copper is actually more expensive to ILECs than leaving it in place since additional expenditures must be incurred to remove copper, and removal eliminates the opportunity for the ILEC to receive revenues from leasing the copper to third parties. It would be very harmful and pointless to permit ILECs to destroy this plant for any reason, but in particular just to thwart competition to their own fiber-based network. If for no other reason, the Commission should establish meaningful oversight over ILEC copper loop retirement to assure that consumers' substantial investment in "legacy" network plant is not unnecessarily wasted.

II. CURRENT COMMISSION POLICIES DO NOT SUFFICIENTLY PROTECT THE PUBLIC INTEREST IN ACCESS TO NEW SERVICES PROVIDED OVER COPPER LOOPS

A. ILECs Have Strong Anticompetitive Incentives to Retire Copper

ILECs have strong motivations to remove useful copper plant to thwart competition, even if this means wasting a valuable asset. By doing so, they make it more difficult or impossible for a third provider to compete with them in the provision of voice, data, and video services to consumers. As recently noted by business observers, ILECs can foreclose additional competition

⁸ In fact, given the depreciation rates that many BOCs have applied to copper facilities since the mid-1980s, it is likely that consumers have paid much more than the original investment in copper plant.

by removing copper loops.⁹ ILECs have stated elsewhere that “closing the market to a competitor not only unfairly punishes that competitor, but also punishes consumers because it limits their choice and thus increases price and delays availability.”¹⁰ BOCs should be held to that same standard here.

As long as companies that own loop transmission facilities can exercise market power, they will be able to control downstream markets that rely on those transmission facilities. As has been explained in other proceedings, BOCs possess market power in provision of wholesale local loop transmission services because they are usually the only provider of those services.¹¹ Thus, when faced with competition for their core services, the BOCs have a strong incentive to exercise their control over transmission facilities to drive non-affiliated providers out of the market or raise their cost of providing service to frustrate their ability to compete.

ILECs’ ability to harm competitive providers is unfortunately enhanced because of the broadband unbundling relief adopted by the Commission in the *TRO*,¹² and the *271 Forbearance Order*.¹³ Now that the Commission has limited the ability of CLECs to obtain broadband UNEs

⁹ “Verizon’s \$18 Billion Gamble,” *Forbes.com*, http://www.forbes.com/2007/01/09/fios-fiber-broadband-tech-media-cz_bu_0109ces-verizon.html (January 11, 2006) (“And by tearing out the copper lines in a Fios neighborhood, Verizon’s locked up the customer for good.”).

¹⁰ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Comments of BellSouth Corporation at 46 (April 8, 2003).

¹¹ See e.g. *Opposition of Alpheus Communications, LP et al*, WC Docket No. 06-125, filed August 17, 2006, pp 14 - 21.

¹² *Review of § 251 Unbundling Obligations of Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) (“*TRO*”).

¹³ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Docket No. 01-338, *SBC Communications Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-235, *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket No. 03-260, *BellSouth Telecommunications, Inc., Petition for Forbearance*

to serve the mass market, the Commission has seriously harmed CLECs ability to provide IP-enabled and other services to that market if copper loops are not available. Further, because CLECs are nonetheless impaired in their ability to serve that market without broadband UNE access, CLECs will not realistically be able to construct their own broadband networks. In light of these practical difficulties and unbundling limitations, CLECs will be particularly vulnerable to BOC efforts to unnecessarily retire copper loops.

BOCs' incentive and ability to harm competitors by unnecessarily retiring copper loops is highlighted by the fact that there is absolutely no economic or technical reason that prevents ILECs from leaving copper in place and making it available for unbundling pursuant to Section 251(c)(3) if they overbuild with fiber. As stated by the Commission in the *TRO*, "[t]he construction of new facilities does not in itself alter a competitive LEC's ability to use the incumbent's network," noting that Qwest does not remove copper when it overbuilds with fiber.¹⁴

Thus, except in the limited range of instances where retirement is necessitated by natural events or accidents, there is no rational basis for BOCs to retire copper except to assure that it is no longer available to CLECs to provide competitive services.

Nor may the Commission rely on a predictive judgment that BOCs will make copper loops available to CLECs notwithstanding incentives to thwart intramodal competition. The Commission's predictive judgment in the *Omaha Forbearance Order* that Qwest would make reasonable wholesale offerings to CLECs has already been proven wrong.¹⁵ And BellSouth's rush to unnecessarily retire the feeder portion of copper loops provides experience that verifies

Under 47 U.S.C. § 160(c), WC Docket No. 04-48, Memorandum Opinion and Order, FCC 04-254, rel. Oct. 27, 2004 ¶ 22 ("*Section 271 Forbearance Order*")

¹⁴ *TRO* fn. 851.

¹⁵ Letter to Marlene H. Dortch from Chris MacFarland, McLeodUSA Telecommunications Services, Inc., WC Docket No. 05-281, filed December 15, 2006.

that ILECs will act on anticompetitive incentives to retire copper loops.¹⁶ Cavalier repeatedly has been denied unbundled access to loops in the Verizon region because of “no facilities” caused, according to Verizon, by “no copper.” The unavailability of copper loops in these instances forecloses the provision to consumers of innovative packages of voice, high-speed Internet access, and video programming services at competitive prices.

B. Current Rules Do Not Adequately Protect the Public Interest

The Commission’s current approach to overbuilt copper loops derives from the *TRO*, in which it revised its policy concerning access to unbundled network elements based on line drawing between “legacy technology and newer technology.”¹⁷ The Commission decided to limit the ILECs’ unbundling obligations on overbuilt FTTH loops and hybrid loops, and to exempt “greenfield” fiber loops from all unbundling requirements, for the express purpose of giving the ILECs an increased incentive to deploy fiber in their networks.¹⁸ Nonetheless, the Commission required ILECs to continue to provide unbundled access to legacy copper loop facilities, with respect to all elements subject to an impairment finding, as long as the ILEC keeps those facilities in its network.¹⁹

Notwithstanding the continuing obligation of ILECs to provide unbundled access to copper loops, the Commission in the *TRO* declined to prohibit ILECs from retiring copper loops or subloops that they have replaced with fiber.²⁰ The Commission stated that its Section 251(c)(5)

¹⁶ A list of BellSouth’s numerous copper loop retirements over the last year is at http://interconnection.bellsouth.com/alerts_and_notifications/network/network_disclosures/network_lett_06.html (January 8, 2007).

¹⁷ *TRO* ¶ 293.

¹⁸ *TRO* ¶¶ 275, 278, 288.

¹⁹ *TRO* ¶ 277, n.850.

²⁰ *TRO* ¶ 271.

network modification disclosure requirements apply to the retirement of copper loops and subloops, and it modified those rules to provide for an opportunity to object to copper loop retirements filed on long term notification.²¹ Previously, the opportunity to object applied only to short-term notifications. However, the Commission did not provide any opportunity to object to retirement of copper feeder plant.²² Further, the opportunity to object is largely meaningless, because the Commission contemplates that “[u]nless the copper retirement scenario suggests that competitors will be denied access to the loop facilities required under our rules,” oppositions to the network disclosure will be deemed denied unless the Commission within 90 days determines otherwise.²³ The ILEC must additionally comply with any applicable state requirements.²⁴

Current rules do not require the ILECs to provide any justification for the proposed retirement, and therefore could permit ILECs to waste valuable assets merely in order to preclude potential competitors from providing competitive services. Nor do current rules describe or limit when it is appropriate for ILECs to retire copper loops. And, there is no opportunity to object to retirements of the feeder portion of loops. In fact, BellSouth files retirement notices on a regular and increasingly frequent basis, particularly concerning the feeder portion of the loop.²⁵

The *TRO* provides no explanation or justification of these gaps in the Commission’s approach to copper loop retirement. The Commission’s consideration in the *TRO* of copper loop policy appears to have been somewhat cursory. Indeed, the lack of oversight of copper loop

²¹ *TRO* ¶ 271

²² *TRO* n.829.

²³ *TRO* ¶ 282.

²⁴ 47 C.F.R. § 51.319(a)(3)(iv)(A) and (B).

²⁵ See e.g., Revised Notice of Network Change - Vero Beach, Florida Replacing Copper Facilities with Fiber and Digital Loop Carrier Systems, Notification No. ND20060057, November 6, 2006; Notice of Network Change --Oakdale, LA, Replacing Copper Facilities with Fiber and Digital Loop Carrier Systems, Notification No. ND20060162, November 2, 2006.

retirement contradicts and undercuts the thrust of Commission's unbundling policy in a number of respects. The line drawing between legacy and new technology, even if otherwise valid, was breached without explanation with regard to retirement of legacy copper loops. The Commission explicitly stated that its policy was to require ILECs to provide unbundled access to "spare copper loops," yet failed to effectuate that policy by ensuring that those same spare copper loops remain available after they are overbuilt with fiber. Similarly, the Commission intended to assure access to copper subloops, but did not provide any opportunity for objections to the retirement of the feeder portion of the loop. Permitting copper loop retirement for anticompetitive purposes also contradicts the *TRO* requirement that ILECs may not "adopt any practice, policy, or procedure that has the effect of degrading or disrupting access" to legacy technology.²⁶

Current rules also disserve the public interest because they fail to implement the mandate of Section 706 of the 1996 Act. That Section requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... including [by] measures that promote competition in the local telecommunications market"²⁷ The reality that competitive carriers can now provide affordable packages of voice, video, and high-speed Internet access over copper requires that the Commission fulfill the policy of Section 706 by revising rules to protect against wasteful, anticompetitive loop retirement by incumbent carriers.

In addition, current rules harm homeland security goals. A third wire to the home will significantly enhance the public interest in rapid, cost-effective recovery from natural disasters or national security threats. As recently noted in connection with the Katrina disaster, "eyewitness

²⁶ *TRO* ¶ 294.

²⁷ 47 U.S.C. § 157(b).

accounts underscore how important it is that our nation's first responders have access to reliable and redundant communications in the event of an emergency...."²⁸ The national interest in redundancy extends to wireline services as well. Allowing ILECs to remove legacy copper that could be used to restore vital communications services seriously disservices the public interest.

In light of the lack in current rules of strong supervision over ILEC anticompetitive loop retirement practices, and the *TRO*'s cursory treatment of this area, current rules should be revised as described below to assure that they adequately protect the public interest.

III. PROPOSED RULE CHANGES AND CLARIFICATIONS

A. The Commission Should Clarify "Retirement"

In reevaluating its copper loop retirement policy, the Commission should first clarify what is meant by "retirement." The Commission apparently contemplated in the *TRO* that this could encompass removal of copper.²⁹ But it is not clear at this time that retirement might also encompass any of the following or some combination thereof: a declaration by the ILEC that copper is "retired," *i.e.* it is no longer available for unbundling while leaving it in place; a decision by the ILEC that it will disable the copper while leaving it in place in a condition from which it could be made readily available with some modification; or a decision by the ILEC that it will no longer maintain a copper facility, without physically removing or disabling it. The Commission should clarify that retirement refers to the physical removal of copper, and that any action short of that does not terminate the ILEC's obligation to provide unbundled access to loop

²⁸ *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, Development of Operational, Technical and Spectrum Requirements for Meeting Federal*, PS Docket No. 06-229, *State and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket No. 96-86, Ninth Notice of Proposed Rulemaking, FCC 06-181, (released Dec. 20, 2006), separate statement of Commissioner Deborah Taylor Tate.

²⁹ *TRO* n.847.

elements over copper. However, as discussed below, the Commission should only permit ILECs to retire copper as so defined in a very narrow range of circumstances.³⁰

B. The Standard for Permissible Loop Retirements Should be Clarified And Strengthened

As noted, in the *TRO* the Commission provided that an objection to a copper loop retirement would be deemed denied within sixty days “unless the retirement suggests that competitors will be denied access to the loop facilities required under the rules.”³¹ ILECs will argue that this standard for evaluating protests of copper loop retirements means that the retirement will be permitted to go forward except in the unlikely event that the ILEC will not provide access to fiber that the Commission required in the *TRO*, *i.e.* the ILEC will deny access to a voice grade channel on an overbuild fiber loop or to the TDM capability of hybrid loops. Thus, ILECs will interpret current rules to permit them to remove copper for virtually any reason, no reason, or for anticompetitive purposes. And, for all the reasons stated in the petition, allowing ILECs unfettered discretion in retiring valuable copper assets would harm the public interest by, among other reason, denying consumers the benefits of additional broadband service offerings. Accordingly, the Commission should revise the standard for review of objections to notices by ILECs of retirement of copper loops and subloops.

Specifically, the Commission should provide that the retirement will not be permitted unless the retirement is necessitated by undue hardship that would be caused to the ILEC if retirement does not go forward, or if the retirement is caused by factors outside of the control of

³⁰ In some instances, ILECs have used the claimed need to remove retired copper as a barrier to deployment of competitive facilities by CLECs. The Commission also should solicit comment on whether it should require ILECs to physically remove abandoned copper facilities in the limited range of circumstances in which ILECs should be permitted to retire copper loops.

³¹ *TRO* ¶ 282.

the ILEC such as natural events or accidents.³² ILECs should have the burden of justifying copper retirements under this revised standard. This standard for review of objections to proposed retirement of copper loops and subloops will bring consistency to the Commission's unbundling policy established in the *TRO*. Under this standard ILECs must provide access to spare copper as required under current rules but they additionally may not thwart this policy by engaging in wasteful and anticompetitive removal of spare copper that will deny consumers the benefits of additional broadband competition.

C. An Opportunity for Comment Should Apply to Retirement of the Feeder Portion of Loops

In the *TRO*, the Commission modified its network disclosure rules to provide for an opportunity to object to notices of retirement of copper loops and subloops, but provided that this would not apply to notices of retirement of the feeder portion of loops.³³ However, if the feeder portion of the loop is unavailable for unbundled access, the practical difficulty of obtaining access to the remaining portion of the loop forecloses competitive access to the customer. Accordingly, the Commission in new rules should extend that opportunity to object to loop retirements to the feeder portion of the loop as well. This, combined with the proposed revised standard of review of objections to copper loop retirements, will help assure that consumers obtain the benefits of their investment in legacy copper loops.

D. Objections Should Not Be Deemed Denied

Under current rules, objections to copper loop retirements (where objections are permitted at all) are deemed denied unless the Commission takes action on the objection within 60

³² This would include circumstances, presumably rare, where events outside the ILEC's control have damaged the loop plant to the point that it is no longer economically reasonable to maintain it.

³³ *TRO* n.829.

days.³⁴ Although the Commission in the *TRO* did not provide any reasons for this denial-by-default approach, it may have been meant to limit administrative burdens on the Commission of issuing numerous written decisions denying objections where the current copper loop standards envision that copper loop retirements will be allowed to go forward in most cases even if undertaken for anticompetitive reasons. But under revised standards, as proposed in this petition, only those loop retirements necessitated by natural events, accidents, or undue hardship would go forward. Thus, a degree of oversight of ILEC practices in this area more consistent with the public interest would not raise the prospect of the Commission needing to issue numerous decisions denying objections to copper loop retirements. If revised standards are adopted, therefore, there would be no significant burden on the Commission by providing that objections are denied only on written order of the Commission. And, more importantly, this would better assure that BOCs are not permitted by default to engage in copper loop retirements for anticompetitive purposes. Accordingly, the Commission should eliminate the automatic denial aspect of objections to copper loop retirements.

E. The Commission Should Clarify that States May Adopt Restrictions that Are Stronger Than FCC Rules

In the *TRO*, the Commission provided that ILECs must comply with any applicable state requirements governing copper loop retirement.³⁵ Preservation of state authority is a necessary and appropriate aspect of any Commission copper loop retirement policy. The undersigned competitive carriers strongly support this approach. Indeed, this is about the only aspect of the policy established in the *TRO* concerning copper loop retirement that potentially reflects that legacy copper loops should be preserved to permit provision of valuable competitive services to

³⁴ *TRO* ¶ 282.

³⁵ 47 C.F.R. § 51.319(a)(3)(iv)(A) and (B).

consumers. However, the Commission should take the opportunity in this proceeding to strengthen and clarify this approach by stating expressly that it would not conflict with federal policy for states to prohibit or restrict copper loop retirements.

F. The Commission Should Consider Sale or Auction of Spare Copper Loops

The Commission should explore in this proceeding the feasibility and potential advantages of requiring that ILECs be required to offer for sale loops that they might otherwise choose to retire. Sale of loops would arguably permit ILECs to terminate ownership and most responsibility for unwanted loops while also preserving the potential benefits of use of spare copper loops for provision of competitive services.

The Commission should offer for comment the possibility of requiring or authorizing ILECs to auction or otherwise sell copper loops pursuant to some public and fair process. The Commission should consider the manner in which purchasers could obtain access to sold copper loops in ILEC central offices or at remote locations and ILEC obligations to maintain at cost-based prices portions of sold copper loops that remain on their premises or under their control. The Commission should explore whether any limits should be imposed on ILECs' ability to sell copper, so that sales may not be used in a way that does not realistically permit acquisition by competitors, such as by setting unrealistically high minimum prices.

G. Forbearance Standards Should Be Clarified to Establish that UNE Forbearance Does Not Encompass Unused Pre-Retirement Copper Loops

In the *Omaha Forbearance Order*, the Commission forbore from application of Section 251(c)(2) unbundling obligations to Qwest in Omaha, Nebraska.³⁶ Notably lacking in that

³⁶ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Sec. 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, FCC 05-170, WC Docket No. 04-223,

decision, however, is any discussion of whether the forbearance does, or should, apply to spare, unused copper loops overbuilt by fiber. Although that decision examined the costs and benefits of unbundling generally, it did not do so with respect to spare copper loops that had been replaced by fiber. A public interest analysis with respect to application of unbundling requirements to spare copper loops and subloops would have produced a far different calculus than what the Commission obtained in the *Omaha Forbearance Order* with respect to network elements that the ILEC would use to serve its customers.

In the *Omaha Forbearance Order*, the Commission concluded that forbearance would be consistent with the public interest because the costs of unbundling exceeded the benefits. It concluded that the costs of regulatory intervention exceeded the benefits in those wire centers where competition by a facilities-based provider has sufficiently developed.³⁷ But this analysis would be very different where the costs of regulatory intervention would apply to spare copper replaced by fiber. In that situation, the incumbent may continue to use fiber to compete for a customer for the same or different services than would be provided by the CLEC using spare copper. For example, the CLEC could provide voice service using spare copper while the ILEC provided broadband. Or the ILEC and CLEC could each meet some of the customer's needs for the same services. In this situation, it could not be said that unbundling would impose the same costs as when the CLEC seeks unbundled access to the very facility that the ILEC would use to provide service to its customers. In fact, in light of the benefits of access to spare copper loops, and the fact that fiber remains available to provide service to customers, the benefits of continued access to legacy copper clearly outweighs any harm.

released December 2, 2005 ("*Omaha Forbearance Order*"), *appeal pending*, *Qwest v. FCC*, Case No. 05-1450 (DC Circuit).

³⁷ *Omaha Forbearance Order* ¶ 77.

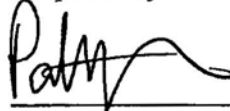
In the *Omaha Forbearance Order*, the Commission additionally found that the public interest would be served by forbearance because it would help achieve regulatory parity between the ILEC and the cable competitor. But this rationale made no sense even in the context of the *Omaha Forbearance Order* because there the Commission relied on application of Section 271 requirements to Qwest, which are not applicable to cable operators. Thus, parity is not a significant factor in the Commission's forbearance analysis, and properly so. But even if it were, it should have no weight in the context of unbundled access to spare copper loops and subloops in light of the significant public interest benefits described elsewhere in this petition that can be obtained from use of copper loops that have been overlaid with fiber.

In light of those significant public interest benefits from use of spare copper by competitors, it would clearly disserve the public interest if forbearance from application of Section 251(c)(3) obligations to fiber, or to copper that has not been overlaid by fiber, were to be extended to spare copper loops. Permitting forbearance to apply to spare copper loops that BOCs could retire without harming their own ability to provide service over fiber would permit BOCs to unnecessarily waste valuable assets that could benefit consumers and harm competition as effectively as if the loops were physically retired. Assuming that the Commission embraces the recommendations in this petition, it would make no sense for the Commission to nonetheless permit ILECs to evade a revised copper loop retirement policy through overly broad forbearance. Therefore, in this proceeding the Commission should establish a policy that spare copper will remain subject to unbundling in Omaha, Nebraska, and other areas, if any, where Section 251(c)(2) forbearance might otherwise become applicable.

IV. CONCLUSION

In order to adequately protect the public interest in provision of services over copper loops, the Commission should promptly issue a Notice of Proposed Rulemaking looking towards adoption of the rules suggested in this petition, and should in the interim clarify its existing rules as suggested in Sections III.A and E, above.

Respectfully submitted,



Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
Bingham McCutchen LLP
2020 K Street, N.W.
Washington, DC 20006
(202) 373-6000

Attorneys for

BridgeCom International, Inc.
Broadview Networks, Inc.
Cavalier Telephone, LLC
Eureka Telecom, Inc. d/b/a InfoHighway
Communications
Florida Digital Network, Inc. d/b/a FDN
Communications
IDT Corporation
Integra Telecom, Inc.
DeltaCom, Inc.
McLeodUSA Telecommunications Services, Inc.
Mpower Communications Corp.
Norlight Telecommunications, Inc.
Pacific Lighnet, Inc.
RCN Telecom Services, Inc.
RNK, Inc.
Talk America Holdings, Inc.
TDS Metrocom, LLC; and
U.S. Telepacific Corp. d/b/a Telepacific
Telecommunications

January 18, 2007